

# Introduction into the European JHA Acquis in the Area of Criminal Law

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## The Area of Criminal Law at European Level

- substantive criminal law
- criminal procedural law
- inter-state/cross-border co-operation  
in criminal matters
  - judicial co-operation
  - police co-operation
  - customs co-operation

## Principal Co-operation Levels in Europe, Relevant as Regards Criminal Law

- Council of Europe (hereafter: CoE)
- European Communities (hereafter: EC)  
/European Union (hereafter: EU)
- Schengen Group

### Council of Europe (1)

- 1949
- today: 41 countries
- broad mandate, including penal matters
  - judicial co-operation in criminal matters in general
  - judicial co-operation in criminal matters /criminal policy (including aspects of substantive criminal law and criminal procedural law) with regard to specific topics and/or particular offences

## Council of Europe (2)

- judicial co-operation in criminal matters in general (1)
  - 1957 European Convention on Extradition
  - 1975 Additional Protocol
  - 1978 Second Additional Protocol
- 1959 European Convention on Mutual Assistance in Criminal Matters
  - 1978 Additional Protocol
- 1978 Additional Protocol to the European Convention on Information on Foreign Law

## Council of Europe (3)

- judicial co-operation in criminal matters in general (2)
  - 1964 European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders
  - 1970 European Convention on the International Validity of Criminal Judgements
  - 1972 European Convention on the Transfer of Proceedings in Criminal Matters
  - 1983 Convention on the Transfer of Sentenced Persons
    - 1997 Additional Protocol
  - 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

## Council of Europe (4)

- judicial co-operation in criminal matters /criminal policy with regard to specific topics and/or particular offences (not part of the JHA acquis)
- computer-related crime/Criminal procedural law connected with it, corruption, crimes against humanity/war crimes, criminal policy/justice in general, cultural property, data protection, DNA, drugs, environmental crime, firearms, intimidation of witnesses/ rights of the defence, intolerance/racism and xenophobia, mediation, prison, road traffic, sanctions, (sexual) offences against minors, terrorism, (victims of) violence

## EC/EU Institutional Framework

- EC - Treaties Establishing the
  - European Coal and Steel Community (1951)
  - European Atomic Energy Community (1957)
  - European Economic Community (1957) (hereafter: TEC)
- Espace judiciaire Européen/ European Political Co-operation
  - between the Member States, outside the formal framework of the European Communities
- Treaty on European Union (hereafter: TEU)
  - Maastricht (7 February 1992)
  - Amsterdam (2 October 1997)

## European Economic Community

- realization of an internal market, i.e. an area without internal borders in which the free movement of goods, capitals, services and persons is guaranteed
- focus on economic and monetary integration
- no competence as regards criminal law (however: competence to combat fraud against the EC budget on an administrative level)

## Espace judiciaire européen (European judicial area)

- idea launched in 1977 (9 Member States)
- by Valérie Giscard d'Estaing
- aim: closer co-operation in the field of judicial co-operation than on CoE level
- 1979 Dublin Agreement (additional to the CoE Convention on the Suppression of Terrorism - never entered into force)
- Draft 'Espace' Convention (extradition - never adopted)

## European Political Co-operation (1)

- foreign affairs
- asylum/external frontiers/immigration
  - Ad Hoc Group Immigration
  - Group of Coordinators (Rhodos)
  - Dublin Convention 15 June 1990 (asylum)
  - Draft external frontiers convention
- customs co-operation
  - Mutual Assistance Group - MAG/MAG ('92)

## European Political Co-operation (2)

- police co-operation
  - started mid-seventies
  - Trevi (terrorism, radicalism, extrémisme, violence internationale)
  - Trevi 1-2-3 and '92
- judicial co-operation
  - activities (supra: Espace judiciaire européen) taken up again
  - by group judicial co- operation
  - 5 conventions drawn up between the EC Member States

## European Political Co-operation (3)

- 5 conventions relevant to judicial co-operation in criminal matters
  - Agreement of 25 May 1987 on the application among the EC Member States of the CoE Convention on the transfer of sentenced persons
  - Convention of 25 May 1987 between the EC Member States on double jeopardy
  - Agreement of 26 May 1989 between the EC Member States on the simplification and modernization of methods of transmitting extradition requests
  - Agreement of 6 November 1990 between the EC Member States on the transfer of proceedings in criminal matters
  - Convention of 13 November 1991 between the EC Member States on the enforcement of foreign criminal sentences

## Maastricht Treaty (1)

- 1 November 1993 till 30 April 1999
- European Union, based on three pillars
  - 1st pillar = traditional 3 European Communities (widening the scope of the EEC to such an extent that it is called: European Community)
  - 2nd pillar = CFSP - common foreign and security policy (new fields of competence)
  - 3rd pillar
    - = JHA - justice and home affairs (new fields of competence)
    - Title VI of the Treaty
    - Articles K.1.7-8-9 of the Treaty

## Maastricht Treaty (2)

- JHA matters of common interest (Article K.1)
  - 1. asylum policy
  - 2. crossing/control of external borders
  - 3. immigration/3rd country nationals
  - 4. combating drug addiction
  - 5. combating international fraud
  - 6. judicial co-operation in civil matters
  - 7. judicial co-operation in criminal matters
  - 8. customs co-operation
  - 9. police co-operation in criminal matters, in connection with the establishment of Europol

## Maastricht Treaty (3)

- New institutional framework
  - for the activities previously undertaken within the context of the 'European Political Co-operation'
- Legal Instruments of the 3rd pillar
  - Joint positions (no direct effect - only binding upon the Governments of the Member States)
  - Joint actions (no direct effect - only binding upon the Governments of the Member States)
  - Conventions/Treaties (potentially binding upon the citizen -subject to approval and ratification)



## Maastricht Treaty (4)

- Right of Initiative
  - Articles K.1.1-6: Member States & Commission
  - Articles K.1.7-9: Member States only (sensitive)
- Decision-making
  - unanimity required
  - JHA Council - Coreper - K4 Committee - steering groups (3) - working groups (many)
- Role traditional EC institutions
  - Commission (associated)
  - Parliament (informed)
  - Court Of Justice (conventions may stipulate jurisdiction to interpret their provisions and to rule on any disputes regarding their application)

## European Union (1)

- Legal instruments regarding co-operation in criminal/customs matters in general (1)
  - judicial co-operation
    - 1995 Convention on simplified extradition procedure
    - 1996 Joint Action concerning a framework for the exchange of liaison magistrates to improve judicial cooperation
    - 1996 Convention relating to extradition
    - 1998 Joint Action on good practice in mutual legal assistance in criminal matters
    - 1998 Joint Action on the creation of a European Judicial Network
    - 1998 Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime

## European Union (2)

- legal instruments regarding co-operation in criminal/customs matters in general (2)
  - police co-operation
    - 1995 Convention on the establishment of a European Police Office (Europol Convention)
    - etcetera
  - customs co-operation
    - 1995 Convention on the use of information technology for customs purposes
    - 1997 Convention on mutual assistance and cooperation between customs administrations (Naples II)
    - etcetera

## European Union (3)

- legal instruments and policy documents regarding co-operation in criminal and customs matters/criminal policy with regard to specific topics and particular offences (only partly part of the JHA acquis)
  - counterfeiting, DNA, drugs, environmental crime, financial interests of the EU/fraud/corruption, football, high tech/cyber crime, illegal immigration/employment of third country nationals, interception of telecommunications, law and order and security, organized crime, racism and xenophobia, road traffic, terrorism, trade in human beings and sexual exploitation of children

## TEU - Post-Amsterdam (1)

- as from 1 May 1999
- European Union, based on three pillars
  - 1st pillar = traditional 3 European Communities
  - 2nd pillar = CFSP
  - 3rd pillar
    - scope narrowed to **judicial** and **police co-operation** in criminal/customs matters (instead of JHA in general)
    - Title VI of the Treaty
    - Articles 29-42 of the Treaty
    - asylum/external frontiers/immigration matters transferred to the EC/1st pillar (transition period 5 years)

## TEU - Post-Amsterdam (2)

- Legal Instruments of the 3rd pillar
  - Joint positions
  - Framework decisions (new)
    - binding upon the Member States as to the result to be achieved, but leaves to the national authorities the choice of form and methods - no direct effect
    - for the purpose of approximation of the laws and regulations of the Member States - mainly in the field of **substantive criminal law** (infra)
  - Decisions (new)
    - no direct effect - only binding upon the Governments of the Member States
    - for any purpose excluding approximation of the laws and regulations of the Member States
  - Conventions/Treaties

## TEU - Post-Amsterdam (3)

- Right of Initiative
  - Member States & Commission
- Decision-making
  - still unanimity required
  - JHA Council - Coreper - Committee Article 36 (CATS) - working groups (many)
- Role traditional EC institutions
  - Parliament (mandatory consultation)
  - Court Of Justice (Member States may accept jurisdiction to give preliminary rulings on the validity /interpretation of (framework) decisions, conventions and implementing measures)

## TEU - Post-Amsterdam (4)

- remaining 3rd pillar
  - aim: to provide citizens with a high level of safety within an an area of freedom, security and justice
  - by developing common action in the fields of police and judicialco-operation in criminal matters and by preventing and combating racism and xenophobia
  - this by preventing and combating (organized) crime, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud

## TEU - Post-Amsterdam (5)

- Police co-operation
  - Europol: started its activities on 1 July 1999
  - Article 30, under 2 TEU: within a period of 5 years after the entry into force of the A'dam Treaty
    - Europol must be enabled to facilitate/support the preparation/encourage the coordination and carrying out, of specific investigative actions by the Member States, including operational actions of joint teams comprising Europol representatives in a support capacity
    - a proper legal basis must be created allowing Europol to ask the Member States to conduct/coordinate their investigations in specific cases (Europol II)
    - liaison arrangements must be promoted between prosecuting/investigating officials specialized in fighting organized crime in close co-operation with Europol

## TEU - Post-Amsterdam (6)

- Judicial co-operation - Article 30, under 2 TEU
  - facilitating and accelerating co-operation between competent ministries or equivalent authorities in relation to proceedings and the enforcement of decisions
  - facilitating extradition
  - ensuring compatibility in rules applicable in the Member States, as may be necessary therefore preventing conflicts of jurisdiction
  - progressively adopting measures establishing minimum rules relating to constituent elements of criminal acts and penalties in the fields of organized crime, terrorism and illicit drug trafficking

## Schengen - Post-Amsterdam

- A'dam Treaty has added a protocol to the TEC and the TEU, integrating the Schengen-acquis in the Framework of the EU
- 1990 Schengen Implementing Convention (SIC): applies between 10 EU Member States (+ 5 Scandinavian countries in the spring of 2001)
- Schengen-acquis = part of the EU acquis in the field of JHA!
- to be fully accepted by candidate countries
- SIC: contains a.o. provisions on
  - police co-operation
  - judicial co-operation
  - co-operation with regard to illicit drugs

## EU Action Plan 3 December 1998

- on how best to implement the provisions of the A'dam Treaty on an area of freedom, security and justice
  - joint action plan Council and Commission
  - a.o. future vision as for police and judicial co-operation in criminal/customs matters
- Para 10: the aim of the Treaty is not to create a common territory where uniform detection and investigation procedures would be applicable to all law enforcement agencies in Europe in the handling of security matters

## Tampere European Council of 15-16 October 1999 (1)

- incoming Finnish Presidency (March 1999)
- ‘In establishing an area of freedom, security and justice, we could be inspired by the successful methods we used to create and to accomplish the internal market, i.e. harmonisation of legislation, or where it is considered more appropriate, creation of common minimum standards combined with the application of the principle of mutual recognition. On the other hand, we should remove technical, administrative and legal obstacles which impede cooperation’

## Tampere European Council of 15-16 October 1999 (2)

- outcome of the actual summit
- joint investigative teams
- mutual recognition
- Eurojust
- with regard to criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors, such as financial crime, drugs trafficking, trafficking in human beings, particularly exploitation of women, sexual exploitation of children, high tech crime and environmental crime



## JHA Council of March 2000

- adoption of a 'European Union strategy for the beginning of a new Millennium' in the field of prevention and control of organised crime
  - = follow-up action plan to the EU action plan to combat organised crime, adopted in April 1997
  - setting the lines/goals to be followed/achieved in this area in the coming years
  - about 40 detailed recommendations in various fields and setting target dates to implement them
  - 5 of which specifically aiming at strengthening co-operation with the applicant countries (through practical/direct forms of co-operation, assistance, twinning, etc.)
  - highly relevant as regards: substantive criminal law, procedural criminal law and co-operation in criminal matters

## Nice European Council of December 2000

- Intergovernmental Conference started on 14 February 2000 with a view to
  - adapting the EU institutional framework to the future enlargement
    - revision of the (future) Member States' representation within the European Commission and the EU Council
    - further extension of the principle of majority voting by the EU Council (also in third pillar matters?)
    - creation of a European Public Prosecutor
  - revising/simplifying the existing treaties by
  - adopting a new treaty at the Nice Summit in December 2000 (Treaty of Nice)





Discussion/Questions